

## **Extending the Patent Monopoly to Unpatented Nonstaple Goods - Dawson Chemical Co. v. Rohm & Haas Co.**

Stephen Francis Sherry

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## EXTENDING THE PATENT MONOPOLY TO UNPATENTED NONSTAPLE GOODS— DAWSON CHEMICAL CO. V. ROHM & HAAS CO.

*"With this [opinion], we have about exhausted our present capacity for rational thinking on patent matters. As we noted during oral argument of this case, patent cases are the only cases argued by professionals and decided by amateurs."\**

Congress established the system of granting a legal monopoly to the owner of a patented invention to promote technological innovation.<sup>1</sup> To protect the integrity of the legal monopoly, a patent owner may bring an infringement suit against persons making, using, or selling a patented invention without permission.<sup>2</sup> If the patentee misuses the patent, however, he or she will be barred from obtaining relief against infringement of the invention.<sup>3</sup> An attempt to extend a patent monopoly to embrace unpatented articles is generally regarded as a misuse of the patent.<sup>4</sup> Congress first codified certain

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\**Rohm & Haas Co. v. Dawson Chemical Co.*, 599 F.2d 685, 706, 203 U.S.P.Q. 1, 19 (5th Cir. 1979), *aff'd*, 448 U.S. 176, 206 U.S.P.Q. 385 (1980).

1. The Constitution gives Congress the power to enact laws that establish a patent system: "The Congress shall have power . . . To promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries." U.S. CONST. art. 1, § 8, cl. 8. The fundamental objective of the patent law is to encourage efforts to advance the state of science and technology. The patent law is also directed toward supporting disclosure of advances in knowledge that will benefit society. *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 330-31, 65 U.S.P.Q. 297, 299 (1945). In exchange for disclosing the specifics of a new invention to the public through the patent application, the law provides that "[e]very patent shall contain . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years . . . of the right to exclude others from making, using, or selling the invention throughout the United States." 35 U.S.C. § 154 (1976). See generally *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 492, 52 U.S.P.Q. 30, 32 (1942) (grant to an inventor of a special patent monopoly effectuates the public policy of promoting innovation).

2. See note 20 *infra*.

3. See *B.B. Chem. Co. v. Ellis*, 314 U.S. 495, 497-98, 52 U.S.P.Q. 33, 35 (1942) (use of patent as means of establishing a limited monopoly in unpatented materials held sufficient reason to dismiss patent owner's infringement suit); *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 493, 52 U.S.P.Q. 30, 32 (1942) (courts of equity may decline to entertain an infringement suit when the owner used the patent to restrain competition through an extension of the patent monopoly to unpatented articles); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 463, 36 U.S.P.Q. 35, 36 (1938) (patent owner is denied relief against infringement when he seeks to effect an unauthorized extension of the monopoly); *Carbice Corp. v. American Patents Dev. Corp.*, 283 U.S. 27, 33-34, 8 U.S.P.Q. 211, 214 (1931) (the patent owner is denied relief when he employs a patent in an attempt to secure a limited monopoly over unpatented material).

4. See *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 463, 36 U.S.P.Q. 35, 36 (1938) (every use of a patent as a means of obtaining a limited monopoly over unpatented articles declared invalid); *Carbice Corp. v. American Patents Dev. Corp.*, 283 U.S. 27, 33, 8 U.S.P.Q. 211, 213-14 (1931) (control over the supply of unpatented material is beyond the scope of the patentee's monopoly); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 516 (1917) (every patent is limited to the invention described in the claims of the patent and an extension of the patent monopoly beyond the inherent limits is forbidden). See generally *Scafetta, Ten Years*

aspects of the judicially created doctrines of infringement and patent misuse in the Patent Act of 1952.<sup>5</sup> Since its enactment, federal courts have struggled to determine the type of conduct that ought to be characterized as patent misuse under the Act.<sup>6</sup>

Recently, in *Dawson Chemical Co. v. Rohm & Haas Co.*,<sup>7</sup> the United States Supreme Court first interpreted<sup>8</sup> section 271 of the Act,<sup>9</sup> regarding the

*After Aro II: The Effect of Patent Act Section 271 on the Patent Misuse Doctrine*, 58 J. PAT. OFF. SOC'Y 69 (1976) [hereinafter cited as Scafetta]; Nelson, *Mercoide-Type Misuse Is Alive*, 56 J. PAT. OFF. SOC'Y 134 (1974); Note, *Contributory Infringement and Misuse—The Effect of Section 271 of the Patent Act of 1952*, 66 HARV. L. REV. 909 (1953); Note, *Combination Patents: The Right to Prohibit Sales of Replacement Parts*, 70 YALE L.J. 649 (1961); Note, *Section 271(b) of the Patent Act of 1952: Confusion Codified*, 66 YALE L.J. 132 (1956).

5. Congress codified all the patent laws under a single title with the enactment of the 1952 Patent Act, Act of July 19, 1952, Pub. L. No. 593, § 950, 66 Stat. 792. All current statutory law pertaining to patents is codified at 35 U.S.C. §§ 1-376 (1976). The codification of the judicial doctrine of contributory infringement and aspects of patent misuse appear at 35 U.S.C. § 271 (1976). No statutes encompassed either of these doctrines until the passage of the Patent Act of 1952. See Scafetta, *supra* note 4.

6. *Compare* Buston, Inc. v. Julen, Inc., 223 F. Supp. 697, 140 U.S.P.Q. 181 (S.D.N.Y. 1963) (licensing agreement deemed valid and no misuse found when patentee manufactured and sold unpatented component of a patented invention) and *Sola Elec. Co. v. General Elec.*, 146 F. Supp. 625, 111 U.S.P.Q. 203 (N.D. Ill. 1956) (held not patent misuse when patentee granted implied licenses under the patent by selling an unpatented nonstaple component) with *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872, 169 U.S.P.Q. 759 (2d Cir. 1971) (patent owner found guilty of patent misuse for using patent to force users to purchase an unpatented component) and *Nordberg Mfg. Co. v. Jackson Vibrators*, 153 U.S.P.Q. 777 (N.D. Ill. 1967) (patent owner would have been guilty of misuse despite § 271(d) if users had not been permitted licenses without purchasing unpatented goods).

7. 448 U.S. 176, 206 U.S.P.Q. 385 (1980).

8. Before *Dawson*, the Supreme Court had indirectly considered what conduct should be characterized as patent misuse in *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 141 U.S.P.Q. 681 (1964). The *Aro* Court stated that the question of patent misuse was not an issue in the case but remarked that § 271 had been enacted to reinstate the doctrine that was contained in the *Mercoide* opinions (discussed in notes 44-47 and accompanying text *infra*). The Court cited §§ 271(c) and (d) as examples of how Congress intended to change the judicially created law of patents, but the scope of these sections was not discussed in depth. *Id.* at 491-92, 141 U.S.P.Q. at 688.

9. Section 271 provides in pertinent part:

§ 271 Infringement of patent

....

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would

scope and interaction of patent misuse and contributory infringement. A closely divided Court<sup>10</sup> held that a patent owner has a statutory right to eliminate competitors in the sale of unpatented nonstaple<sup>11</sup> goods essential to the patented invention.<sup>12</sup> Further, the Court declared that the patent owner's use of a tying arrangement<sup>13</sup> was protected by the statute.<sup>14</sup>

The *Dawson* decision represents a questionable departure from the principle that a patent monopoly is limited to the boundaries of the invention itself.<sup>15</sup> Moreover, a tying arrangement, previously condemned as an illicit attempt to extend the patent monopoly,<sup>16</sup> is now recognized as a legitimate agreement. Failing to abide by previously endorsed principles of statutory construction, the *Dawson* Court improperly relied upon an uncertain legislative history to sustain its decision. This Note offers a suggested approach as a more cautious and balanced resolution of the conflicting policy questions presented in *Dawson*. In addition, the decision's impact is assessed, particularly regarding the potential adverse consequences it portends for free market competition in unpatented nonstaple goods.

#### HISTORICAL BACKGROUND

##### *Contributory Infringement versus Patent Misuse*

The language of section 271 of the Patent Act represents the congressional effort to codify the doctrine of contributory infringement as well as certain exceptions to the doctrine of misuse.<sup>17</sup> These two doctrines are judicial

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constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement.

35 U.S.C. § 271(c)(d) (1976).

10. *Dawson* was a five to four decision, with two dissenting opinions. Justices Brennan, Marshall, and Stevens joined in the dissent written by Justice White. 448 U.S. at 223-40, 206 U.S.P.Q. at 408-15 (1980). Justice Stevens also wrote a brief dissent. *Id.* at 240-41, 206 U.S.P.Q. at 415.

11. No decision has been found that attempts to define the word "nonstaple" as it is used among patent lawyers. The word is a term of art in patent law and is generally recognized as a substitute for the phrase "not a staple article or commodity of commerce suitable for substantial noninfringing use" that appears in § 271(c) of the Patent Act of 1952. Nonstaple is a term used to refer to unpatented components of an invention that have no substantial commercial use outside the patented device. See Scafetta, *supra* note 4, at 72-73 n.12.

12. 448 U.S. at 201-02, 206 U.S.P.Q. at 399.

13. A tying scheme is defined as "an arrangement under which a vendor will sell one product only on the condition that the buyer also purchases another and different product." BLACK'S LAW DICTIONARY 1329 (5th rev. ed. 1979). In the context of patent licensing, the tying agreement is accomplished by conditioning the licensing of the patent (the tying product) upon the licensee's purchase of the unpatented components of the invention (the tied product). See generally Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283 (1980).

14. 448 U.S. at 213-14, 206 U.S.P.Q. at 404.

15. See note 33 *infra*.

16. See notes 38 & 39 *infra*.

17. Congress conducted three sets of hearings on the proposed legislation that eventually became the Patent Act of 1952. See note 76 *infra*. Witnesses informed the congressional commit-

creations that originated at different periods during the Court's history.<sup>18</sup> It is essential to trace the origin and development of contributory infringement and patent misuse to understand the policy objectives of each and to evaluate the congressional purpose in enacting section 271.

The doctrine of contributory infringement<sup>19</sup> permits a patent owner to proceed against those who engage in conduct which itself does not constitute direct infringement<sup>20</sup> but instead facilitates direct infringement by others.<sup>21</sup> In 1894, the Supreme Court recognized the doctrine of contributory infringement in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*,<sup>22</sup> but was reluctant to recognize any derivative right to control exclusively the unpatented elements of a patented invention.<sup>23</sup>

tees that the purpose of the new law was to restore a limited version of the contributory infringement doctrine while exempting certain conduct from the purview of patent misuse. See *Hearings on H.R. 3866 before Subcomm. No. 4 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 13-17 (1949). The statutory codification of contributory infringement and exceptions to the patent misuse doctrine appear at 35 U.S.C. §§ 271(c), (d) (1976). See note 9 *supra*.

18. The contributory infringement doctrine was first enunciated in *Wallace v. Holmes*, 29 F. Cas. 74 (C.C.D. Conn. 1871) (No. 17,100), and first endorsed by the Supreme Court in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U.S. 425 (1894). The Court established the patent misuse doctrine in *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 (1917). See Note, *Contributory Infringement and Misuse—The Effect of Section 271 of the Patent Act of 1952*, 66 HARV. L. REV. 909 (1953).

19. The statutory definition of contributory infringement appears in 35 U.S.C. § 271(c) (1976). See note 9 *supra*.

20. Direct infringement is defined by 35 U.S.C. § 271(a) (1976), which provides: "[e]xcept as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent." *Id.*

21. Contributory infringement is essentially an application of the old common law doctrine of joint tortfeasors and imposes liability on those who aid or abet another in an act of direct infringement. 7 A. DELLER, *DELLER'S WALKER ON PATENTS* § 515 (2d ed. 1972) [hereinafter cited as DELLER]. The doctrine is used to ensure the continued vitality of a patentee's legal monopoly by preventing a competitor from manufacturing an incomplete version of the patented invention and marketing the device for buyers to complete. See generally Note, *Section 271(b) of the Patent Act of 1952: Confusion Codified*, 66 YALE L.J. 132 (1956).

As early as 1871, a court endorsed the contributory infringement doctrine. In *Wallace v. Holmes*, 28 F. Cas. 74 (C.C.D. Conn. 1871) (No. 17,100), the alleged infringer sold a burner element for a patented oil lamp. The buyer of the burner element had only to add a glass chimney to complete the patented lamp. The *Wallace* court did not characterize the conduct of the accused infringer as contributory infringement, but the court's description of the activity forms the basic principle and rationale for the doctrine. The court reasoned that persons who manufacture parts of a patented combination and sell those parts with the intent that the buyer will purchase the missing components to complete the device cannot escape liability for patent infringement. *Id.* at 80. To permit such conduct, the court concluded, would render combination patents useless. *Id.*

22. 152 U.S. 425 (1894). The Court endorsed the principle that the manufacture and sale of a single component of a patented invention with the intent that it be combined with the device's remaining parts is an infringement of the patent. *Id.* at 433.

23. The availability of the contributory infringement action to protect the integrity of the patent monopoly was acknowledged in the *Morgan Envelope* decision; however, the doctrine

The Court resolved any indecision it may have had regarding the permissible scope of contributory infringement in *Leeds & Catlin Co. v. Victor Talking Machine Co.*<sup>24</sup> In that case, the alleged contributory infringer had sold specially designed phonograph records for use with a patented phonograph player. The record sold by the alleged infringer was not itself patented but merely an element of the patented machine. The Court found that the record sold to owners of the patented phonograph machine was incapable of any use apart from the patented invention. The *Leeds & Catlin Co.* Court held that a defendant may have engaged in contributory infringement although the element of the patented invention that he sold was itself unpatented.<sup>25</sup>

The decision rendered three years later in *Henry v. A.B. Dick Co.*<sup>26</sup> represents the most liberal interpretation and application of contributory infringement.<sup>27</sup> The plaintiff manufacturer held a patent on a printing machine and required purchasers of the device to agree to buy *all* supplies necessary to operate the machine from the patent owner. The Court held that the patent law afforded the patentee the right to condition the use of its patented invention upon the subsequent purchase of unpatented supplies that were not elements of the patented machine.<sup>28</sup> This decision expanded the patent owner's power to control the market in unpatented goods used with the patented device. The Court implicitly endorsed an extension of the monopoly power to articles outside the invention, recognizing the validity of a conditional licensing agreement as a derivative of a patent owner's power to exploit the patent monopoly.<sup>29</sup> The *Henry* Court apparently considered

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was held inapplicable in that case as the component manufactured by the alleged infringer, an oval toilet paper roll, was found to be perishable and intended as a renewable part of the patented toilet paper dispenser. 152 U.S. at 433. In dicta that foreshadowed the doctrine of patent misuse, the Supreme Court stated that permitting the patent owner to monopolize the market in unpatented articles would be equivalent to giving the owner a patent on the components of the patented device. *Id.*

24. 213 U.S. 325 (1909). In explicitly recognizing the doctrine of contributory infringement, the Supreme Court held that any person contributing to the infringement of a patented device, by virtue of any activity that would facilitate such unauthorized use, was liable as an infringer. The unpatented status of the components in a patented invention was considered irrelevant as to the issue of contributory infringement. *Id.* at 333.

25. *Id.*

26. 224 U.S. 1 (1912).

27. The *Dawson* Court characterized the *Henry* decision as the "highwater mark" of the contributory infringement doctrine. 448 U.S. at 190, 206 U.S.P.Q. at 394.

28. The accused infringer argued that a condition restricting the use of the patented device to buyers who agreed to purchase unpatented supplies manufactured by the patentee gives the patent owner the power to extend his monopoly to embrace any article outside the claims of the patent. The *Henry* Court dismissed that argument stating that such a situation does not cause the unpatented goods to become patented. Acknowledging that competition in the market for the unpatented items would be adversely affected, the Court declared that the effect would be limited, and therefore permitted the conditional licensing practice. 224 U.S. at 31-32.

29. The decision to permit the patent owner to use a tying arrangement was justified by reasoning that the market for the sale of unpatented components was created by the invention of the patented device. Therefore, the patent owner is controlling that which he created and

the encouragement of innovation through patent monopolies of greater importance than the protection of competition in unpatented goods. Other manufacturers competing in the sale of unpatented goods that were the subject of a conditional licensing agreement were therefore vulnerable to a contributory infringement suit.

In the years following *Henry*, the country became aware of the potential for patent abuse and the evils of unchecked monopolies that might flourish under the Court's liberal doctrine of contributory infringement.<sup>30</sup> The Court first signaled its retreat from the principles enunciated in *Henry* when it established the patent misuse doctrine in *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*<sup>31</sup> to offset the negative aspects of the contributory infringement doctrine.<sup>32</sup> The plaintiff in *Motion Picture* owned a patent on a film projector. The patented projection equipment was sold to buyers accompanied by a notice conditioning the use of the projector upon subsequent purchase and use of an unpatented film available from the patent owner. The Court declared that a fundamental principle of patent law maintains that an invention is delineated by the claims in the patent and that the legal monopoly is limited to the invention itself.<sup>33</sup> The public policy favoring competition in a free market for unpatented articles compelled the Court to restrict the patentee's use of the legal monopoly. Any attempt to extend the monopoly beyond the scope of the patented invention was held to be unprotected by the patent grant.<sup>34</sup> The owner of the projection patent was barred from bringing an infringement action because, by tying the use of the patented invention to the purchase of an unpatented article outside the patent grant, the patentee was deemed to have exceeded the bounds of the

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cannot be accused of taking something from the market by monopolizing the supply of component parts. 224 U.S. at 32.

30. Partially in response to the *Henry* opinion, in 1914 Congress passed § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), aimed at condemning the use of certain tying schemes. See *International Business Mach. Corp. v. United States*, 298 U.S. 131, 137 (1936).

31. 243 U.S. 502 (1917).

32. The Supreme Court declared that prior decisions had confused the rights bestowed on the inventor by the patent law and those rights an inventor might possess by virtue of contract law. This led to the conclusion that a patentee possesses the right to impose any conditions upon the use of the patented invention and to enforce those conditions through infringement actions. The Court condemned the use restrictions as the "perfect instrument of favoritism and oppression" and held that the patent law could not be the source for such restrictions. *Id.* at 515.

33. 243 U.S. at 511. The Court in *Motion Picture* stated:

[T]he exclusive right granted in every patent must be limited to the invention described in the claims of the patent and . . . it is not competent for the owner of a patent by notice attached to its machine to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation but which are no part of the patented invention. . . . The patent law furnishes no warrant for such a practice and the cost, inconvenience and annoyance to the public which the opposite conclusion would occasion forbid it.

*Id.* at 516.

34. *Id.*

patent monopoly.<sup>35</sup> The Court expressly overruled *Henry* in the *Motion Picture* decision.<sup>36</sup>

*Motion Picture* not only established the doctrine of patent misuse but also expressly condemned the use of tying arrangements.<sup>37</sup> In a number of subsequent cases, patentees struggled to find some means of legitimately using tying arrangements with patent licensing.<sup>38</sup> The Supreme Court consistently held these arrangements to be patent misuse per se.<sup>39</sup> It is generally conceded,<sup>40</sup> however, that the Court's definitive statement concerning the scope of the patent misuse doctrine and the vitality of the contributory infringement doctrine prior to the enactment of the Patent Act of 1952 is contained in *Mercoid Corp. v. Mid-Continent Investment Co. (Mercoid I)*<sup>41</sup> and *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co. (Mercoid*

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35. *Id.* at 518-19.

36. *Id.* at 518.

37. See note 33 *supra*.

38. In *Carbice Corp. of America v. American Patents Dev. Co.*, 283 U.S. 27, 8 U.S.P.Q. 211 (1931), users of a patented cardboard refrigeration package received implied licenses to use the invention when they bought dry ice from the patent owner's licensee. The continued use of the refrigeration device was explicitly conditioned upon the future purchase of dry ice from the licensee. The Supreme Court barred the patent owner from obtaining relief against other dry ice suppliers stating that the patent was used to secure a limited monopoly over unpatented material used in applying the invention. *Id.* at 33-34, 8 U.S.P.Q. at 212-14. Patent owners seeking to avoid the decision in *Carbice* thought they could escape the application of patent misuse if they used implied licenses without explicitly requiring the purchase of unpatented goods as a condition to use the patented device. Such an attempt was condemned in *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 36 U.S.P.Q. 35 (1938). In *Leitch*, the patent owner supplied all the articles needed to apply the patented cement curing process to buyers, thereby granting them implied licenses. The Supreme Court stated that every use of a patent to obtain a monopoly over unpatented goods was prohibited, irrespective of the nature of the device employed to effect the unauthorized extension. *Id.* at 463, 36 U.S.P.Q. at 36.

39. The patent owner in *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 52 U.S.P.Q. 30 (1942), licensed canning companies to use a patented salt dispensing machine conditioned upon the purchase of salt from him. Use of the patent as a tying product to restrain competition in unpatented articles, the tied product, barred the patentee from obtaining relief against alleged infringement by competitors. *Id.* at 491, 52 U.S.P.Q. at 33.

One patent owner attempted to distinguish the tying scheme on the basis of the nonstaple nature of the unpatented good being tied. In *B.B. Chem. Co. v. Ellis*, 314 U.S. 495, 52 U.S.P.Q. 33 (1942), the patent owner asserted that a tying scheme was permissible if the tied product was a nonstaple good. This argument was explicitly rejected by the court of appeals. *B.B. Chem. Co. v. Ellis*, 117 F.2d 829, 834-35, 48 U.S.P.Q. 487, 492-93 (1st Cir. 1941). Although the patent owner advanced this argument in its petition for certiorari, there is a disagreement over whether the Supreme Court considered it when handing down its decision in *B.B. Chemical*. See *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. at 194 n.12, 206 U.S.P.Q. at 395 n.12. The Court found that consideration of degrees of economic practicality associated with the myriad of licensing arrangements available to exploit a patent was an invalid basis for assessing the legitimacy of the tying arrangement. 314 U.S. at 498, 52 U.S.P.Q. at 35.

40. See generally, Faber, *Contributory Infringement—A Limited Tort*, 42 CHI.-KENT L. REV. 1 (1965); Scafetta, *supra* note 4; Comment, *A Brief Chronology of the Doctrine of Contributory Infringement and the Defense of Misuse of the Patent Monopoly*, 3 VILL. L. REV. 355 (1958); Note, *Contributory Infringement*, 41 B.U. L. REV. 547 (1961).

41. 320 U.S. 661, 60 U.S.P.Q. 21 (1944).



II).<sup>42</sup> As the *Mercoid* decisions were important in bringing about the passage of section 271, each case must be examined closely.

In both suits the patent was owned by Mid-Continent and it set forth claims covering a novel furnace stoker system. Mid-Continent exclusively licensed Minneapolis-Honeywell to make, use, or sell the patented invention and to grant sublicenses to others to do the same.<sup>43</sup> Minneapolis-Honeywell manufactured a stoker switch which was unpatented and essential to the patented invention. Persons desiring to use the patented furnace system were required to purchase the essential unpatented stoker switch from Minneapolis-Honeywell, and thereby received an implied license to use the patented system.<sup>44</sup> Mid-Continent was paid a royalty by Minneapolis-Honeywell for every switch sold. *Mercoid* manufactured and sold the same specially adapted stoker switches, and refused a sublicense tendered by Minneapolis-Honeywell. When sued by Mid-Continent and Minneapolis-Honeywell for contributory infringement based upon its sale of the stoker switches, *Mercoid* raised the defense of patent misuse.<sup>45</sup> The Court held that Mid-Continent's licensing scheme and Minneapolis-Honeywell's tying arrangement constituted patent misuse per se as each represented an attempt to extend the monopoly to unpatented goods.<sup>46</sup> Dicta in the *Mercoid I* opinion suggested that these two decisions abolished the doctrine of contributory infringement.<sup>47</sup>

The enactment of the Patent Act of 1952 followed the Court's *Mercoid* decisions. The question remained as to what extent Congress intended section 271 to modify those decisions. Did Congress intend section 271 to nullify *only* the dicta in *Mercoid I* by establishing a statutory cause of action for contributory infringement? Was section 271 also meant to signal a retreat from the substantive holdings in the *Mercoid* cases? Could the congressional purpose in enacting this statute have been to provide the patent owner with a statutory grant of authority to control unpatented nonstaple components of

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42. 320 U.S. 680, 60 U.S.P.Q. 30 (1944).

43. *Mercoid I*, 320 U.S. at 663, 60 U.S.P.Q. at 23.

44. *Id.* If a patent owner sells an article which is capable of use only with the patented invention, the sale of such an article impliedly grants to the purchaser the right to use the patented invention. See *United States v. Univis Lens Co.*, 316 U.S. 241, 249, 53 U.S.P.Q. 404, 408 (1942).

45. *Mercoid I*, 320 U.S. at 662, 60 U.S.P.Q. at 23.

46. *Id.* at 663, 60 U.S.P.Q. at 25. Similarly, the *Mercoid II* decision declared that Minneapolis-Honeywell's tying scheme was patent misuse because it was an attempt to control competition in the unpatented article. 320 U.S. at 683-84, 60 U.S.P.Q. at 32. The rule against employing a patent to secure a monopoly over an unpatented article was not altered, even though the unpatented device was the heart of the invention, was the advance in the prior art, or was an integral part of the structure embodying the patent. The Court found the absence of an outside use for the unpatented component irrelevant to the issue of misuse.

47. Justice Douglas' dicta in *Mercoid I* has been cited as the major factor for congressional efforts to codify the doctrine of contributory infringement. Justice Douglas wrote: "The result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement. What residuum may be left we need not stop and consider." 320 U.S. at 669, 60 U.S.P.Q. at 26.

the patented invention? The relationship between the *Mercoïd* opinions and section 271 has been the subject of continuing debate.<sup>48</sup> In attempting to define this relationship, the *Dawson* Court concluded that a patent owner is permitted to create a monopoly in supplying unpatented nonstaple goods through a licensing program incorporating a tying arrangement.

#### FACTS AND PROCEDURAL HISTORY

On June 11, 1974, Rohm & Haas<sup>49</sup> was issued a patent on a process for selectively controlling weeds that grow in rice fields.<sup>50</sup> The patented method involved the application of an unpatented chemical compound, 3, 4-dichloropropionanilide, commonly referred to as propanil.<sup>51</sup> On the day the patent was issued to Rohm & Haas, it filed suit against Dawson Chemical alleging patent infringement.<sup>52</sup>

Dawson Chemical<sup>53</sup> sold propanil to buyers for use in controlling weeds in rice fields long before Rohm & Haas received its patent.<sup>54</sup> In distributing its propanil, Dawson Chemical included instructions that enabled the purchaser to apply the chemical according to the method for which Rohm & Haas later received a patent.<sup>55</sup> After Rohm & Haas filed the infringement suit, Dawson Chemical requested a royalty-bearing license from Rohm &

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48. See Nelson, *Mercoïd-Type Misuse is Alive*, 56 J. PAT. OFF. SOC'Y 134, 142 (1974) (§ 271 intended to permit control of unpatented nonstaple components of invention *only* when alternative license allowed licensee to purchase unpatented components from source other than patent owner); Scafetta, *supra* note 4 (§ 271 intended to signal retreat from the *Mercoïd* decisions and establish statutory cause of action for contributory infringement); Note, *Contributory Infringement and Misuse—The Effect of Section 271 of the Patent Act of 1952*, 66 HARV. L. REV. 909, 914-18 (1953) (dicta in *Mercoïd I* nullified by § 271 but statute does not permit restriction of competition condemned in *Mercoïd* cases); Note, *Combination Patents: The Right to Prohibit Sales of Replacement Parts*, 70 YALE L.J. 649, 656 (1961) (statute granted patentee exclusive right to monopolize sale of components of invention); Note, *Section 271(b) of the Patent Act of 1952: Confusion Codified*, 66 YALE L.J. 132, 137 (1956) (language of § 271 gives no indication that Congress intended to neutralize *Mercoïd* holdings).

49. Rohm & Haas is also referred to as respondent throughout this Note.

50. The patent in suit was United States Patent No. 3,816,092. The patented method virtually eliminated the need for deep water flooding and hand weeding of rice crops. Brief for Respondent at 4-5, *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 206 U.S.P.Q. 385 (1980) [hereinafter cited as Brief for Respondent].

51. Propanil is the active element of the patented method and functions as a selective post-emergence herbicide, but is itself not patented. Monsanto Company owned a patent on propanil that was declared invalid as a result of litigation between Monsanto and Rohm & Haas. The court held that propanil was described in or taught by prior art. *Monsanto Co. v. Rohm & Haas Co.*, 312 F. Supp. 778, 164 U.S.P.Q. 556 (E.D. Pa. 1970), *aff'd*, 456 F.2d 592, 172 U.S.P.Q. 323 (3d Cir.), *cert. denied*, 407 U.S. 934, 174 U.S.P.Q. 129 (1972).

52. Brief for Petitioner at 4, *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 206 U.S.P.Q. 385 (1980) [hereinafter cited as Brief for Petitioner].

53. Dawson Chemical is also referred to as petitioner throughout this Note.

54. *Rohm & Haas Co. v. Dawson Chem. Co.*, 191 U.S.P.Q. 691, 695 (S.D. Tex. 1976).

55. 448 U.S. at 183, 206 U.S.P.Q. at 391.

Haas to supply buyers with propanil.<sup>56</sup> Rohm & Haas refused the request and stated that it would authorize the use of the patented invention *only* through the purchase of its propanil.<sup>57</sup>

Dawson Chemical moved for summary judgment on the ground that the licensing practice used by Rohm & Haas constituted patent misuse as the practice involved a tying arrangement and extended the patent monopoly to unpatented goods.<sup>58</sup> The district court granted the motion for summary judgment.<sup>59</sup> The United States Court of Appeals for the Fifth Circuit reversed and remanded for a trial on the merits, holding that Rohm & Haas' conduct constituted nothing more than activities expressly permitted by section 271(d).<sup>60</sup> The Supreme Court granted certiorari, and in a 5-4 decision upheld the court of appeals.<sup>61</sup> The Court held that Rohm & Haas had not engaged in conduct considered misuse either by its method of selling propanil or by its refusal to license competitors to sell propanil.<sup>62</sup>

#### THE DAWSON DECISION

The majority's decision was based on four propositions: (1) the language and structure of section 271(d) protected the respondent's activities; (2) the legislative history of the statute indicated that section 271(d) was meant to change the patent law by retreating from the *Mercoïd* decisions; (3) the facts in *Dawson* were not significantly different from those in *Mercoïd* and could not be relied upon to place respondent's conduct beyond the protection of section 271(d); and (4) the present construction of section 271(d) was not foreclosed by decisions handed down after the enactment of the Patent Act of 1952.

#### *Language and Structure of Section 271(d)*

The *Dawson* Court perceived section 271(d) as a congressional effort to reach a compromise between a patent owner's right to sue contributory infringers and the application of the patent misuse defense.<sup>63</sup> This compromise, in the Court's estimation, conceded the power to control nonstaple goods<sup>64</sup> used in a patented invention to the patent owner. Support for this

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56. Brief for Petitioner, *supra* note 52, at 5.

57. Rohm & Haas manufactures and sells propanil in containers bearing instructions that enable the buyer to practice the patented method of application. By operation of law, purchasers of propanil receive implied licenses to use the patented process. Rohm & Haas, however, has not offered or granted express licenses to either purchasers of propanil or competing suppliers. Brief for Respondent, *supra* note 50, at 6-7.

58. 448 U.S. at 183, 206 U.S.P.Q. at 391.

59. Rohm & Haas Co. v. Dawson Chem. Co., 191 U.S.P.Q. 691, 695 (S.D. Tex. 1976).

60. Rohm & Haas Co. v. Dawson Chem. Co., 599 F.2d 685, 706, 203 U.S.P.Q. 1, 19 (5th Cir. 1979).

61. 448 U.S. at 223, 206 U.S.P.Q. at 407-08.

62. *Id.*

63. *Id.* at 200-01, 206 U.S.P.Q. at 398.

64. See note 11 *supra*.

conclusion was derived from the language of the three subsections of section 271(d). Pursuant to section 271(d), a patentee is permitted to (1) make and sell nonstaple goods used in connection with an invention, (2) use a method of licensing that does not involve explicit agreements, and (3) bring suit against an alleged contributory infringer without fear that such an action will be construed as an unlawful attempt to suppress competition.<sup>65</sup>

In characterizing the conduct of the respondent in *Dawson*, the Court stated: "[Rohm & Haas] sells propanil; it authorizes others to use propanil; and it sues contributory infringers."<sup>66</sup> The majority concluded that this conduct was no different from conduct expressly protected by the statute.<sup>67</sup> The petitioner argued that Rohm & Haas had conditioned the right to use the patented method upon the purchase of unpatented propanil<sup>68</sup> and the Court conceded that this tying arrangement was not expressly covered by the language of section 271(d).<sup>69</sup> The Court acknowledged that the respondent's conduct had the effect of suppressing competition in the sale of the unpatented commodity, but nevertheless concluded that such a tying arrangement did not extend the patent owner's control over the unpatented good beyond that explicitly allowed by section 271(d).<sup>70</sup>

#### *Legislative History of Section 271(d)*

Dawson Chemical argued that the purpose of section 271 was simply to clarify the law of contributory infringement rather than to make any substantive changes.<sup>71</sup> The Court disagreed and reasoned that a statement by Senator McCarren during the floor debate concerning the Patent Act supported the conclusion that the legislation was intended to change the patent law.<sup>72</sup> Senator McCarren stated that the Patent Act included several changes in response to prior Supreme Court decisions.<sup>73</sup> The committee report on the bill from the House of Representatives<sup>74</sup> also was relied upon to bolster the view that the legislation had been intended to work major changes in the patent law and eliminate confusion that had resulted from prior court decisions.<sup>75</sup>

Having concluded that one of the intended effects of the 1952 Patent Act was to create significant substantive changes in the law, the Court evaluated the legislative history to ascertain the meaning and scope of section 271. The sources primarily relied upon for information about section 271 were the

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65. See note 9 *supra*.

66. 448 U.S. at 202, 206 U.S.P.Q. at 399.

67. *Id.*

68. Brief for Petitioner, *supra* note 52, at 9.

69. 448 U.S. at 202, 206 U.S.P.Q. at 399.

70. *Id.*

71. Brief for Petitioner, *supra* note 52, at 19-22.

72. 448 U.S. at 203, 206 U.S.P.Q. at 399.

73. 98 CONG. REC. 9323 (1952).

74. H.R. REP. NO. 1923, 82nd Cong., 2d Sess. (1952).

75. 448 U.S. at 203-04, 206 U.S.P.Q. at 399-400.

hearings that led to the enactment of the Patent Act of 1952,<sup>76</sup> particularly the testimony of witnesses supporting and opposing section 271.<sup>77</sup>

One of the bill's proponents, who testified before the congressional committee in 1948, stated that the purpose of sections 271(c) and (d) was to reverse the trend of Supreme Court decisions that had indirectly eroded the contributory infringement document.<sup>78</sup> Other proponents, the Court observed, reinforced that view and added that the legislation was absolutely necessary to nullify the adverse effects of Supreme Court opinions.<sup>79</sup> During the 1949 congressional hearings on section 271, Giles Rich, one of the bill's drafters, testified that restoration of contributory infringement through section 271 was accomplished by retreating from the Supreme Court's *Mercoïd* opinions and by limiting the doctrine of patent misuse.<sup>80</sup> This position was reiterated by the bill's proponents during the 1951 hearings.<sup>81</sup>

Those opposing the bill, the Court stated, believed that the language of section 271(d) would allow the owner of a patent to extend the monopoly beyond the limits defined by previous Supreme Court decisions.<sup>82</sup> The testimony of Department of Justice officials in response to Rich's statements during the 1949 hearings, the Court asserted, confirmed that section 271(d) was intended to nullify the *Mercoïd* Court's interpretation of patent misuse.<sup>83</sup> The Justice Department maintained its opposition throughout the 1951 hearings.<sup>84</sup> The majority in *Dawson* stated that the congressional testimony revealed that Congress intended to grant a statutory right to patent owners to control the nonstaple unpatented goods essential to the patented invention.<sup>85</sup> The Court declared that the tying arrangement used by Rohm & Haas did not overstep the bounds of control permitted by the statute.<sup>86</sup>

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76. The Court relied upon three sets of hearings conducted over the course of four years: (1) *Hearings on H.R. 5988 Before the Subcomm. on Patents, Trademarks and Copyrights of the House Comm. on the Judiciary*, 80th Cong., 2d Sess. (1948) (hearings of May 5, 7, and 12) [hereinafter cited as 1948 *Hearings*]; (2) *Hearings on H.R. 3866 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. (1949) (hearings of May 25 and June 3) [hereinafter cited as 1949 *Hearings*]; (3) *Hearings on H.R. 3760 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 82d Cong., 1st Sess. (1951) (hearings of June 12, 14, and 15) [hereinafter cited as 1951 *Hearings*].

77. 448 U.S. at 204, 206 U.S.P.Q. at 400.

78. The Court cited a memorandum submitted to the congressional subcommittee by the New York Patent Law Association that had helped draft the new bill. See 1948 *Hearings*, *supra* note 76, at 3-6.

79. 448 U.S. at 205-06, 206 U.S.P.Q. at 400.

80. Giles Rich was a prominent patent attorney at the time he testified in favor of § 271 before the congressional subcommittees. Presently, Mr. Rich sits as a judge on the Court of Customs and Patent Appeals. He argued vigorously in favor of reversing the *Mercoïd* decisions and reinstating contributory infringement as a viable basis for infringement suits. See 1949 *Hearings*, *supra* note 76, at 13-17.

81. 1951 *Hearings*, *supra* note 76, at 152.

82. 448 U.S. at 207, 206 U.S.P.Q. at 400.

83. *Id.* at 208-09, 206 U.S.P.Q. at 401-02.

84. 1951 *Hearings*, *supra* note 76, at 165-69.

85. 448 U.S. at 213-14, 206 U.S.P.Q. at 403.

86. *Id.*, 206 U.S.P.Q. at 404.

*Reconciling the Facts in Dawson with Mercoide I & II*

Rohm & Haas' method of exploiting its patent was found to be essentially the same as the method condemned by the *Mercoide* Court.<sup>87</sup> Having demonstrated that the primary purpose of section 271 was to retreat from the holding in *Mercoide*, the Court simply concluded that Rohm & Haas was exempt from the allegation of patent misuse based upon its licensing practices. The Court recognized that Rohm & Haas, unlike the patent owner in the *Mercoide* cases, refused to license its competitors. Dawson Chemical's argument that this factual difference placed Rohm & Haas' conduct outside the provisions of section 271(d) was rejected by the Court.<sup>88</sup> Three reasons were offered for rejecting this contention. First, the statute does not require a patent owner to grant licenses to competitors supplying unpatented nonstaple components. Second, the petitioner failed to produce any evidence from the legislative history that the offer of a license to the accused infringer in the *Mercoide* cases had been the catalyst for the congressional decision to nullify those opinions. Finally, the Court concluded that the respondent's conduct was compatible with the fundamental purpose of the patent grant, to provide the owner with the means for excluding others from profiting by the patented invention.<sup>89</sup>

*Supreme Court Decisions Subsequent  
to the Patent Act of 1952*

Alternatively, the petitioner asserted that the interpretation of section 271(d) was foreclosed by previous Supreme Court decisions construing section 271 and citing the *Mercoide* opinions as valid law.<sup>90</sup> The *Dawson* Court considered the decisions cited by the petitioner<sup>91</sup> irrelevant as none of the opinions directly involved an examination of section 271(d) or contributory infringement.<sup>92</sup> Moreover, the Court rejected the principles of statutory construction set out in *Deepsouth Packing Co. v. Laitram Corp.*<sup>93</sup> requiring a "clear and certain signal from Congress" before the Court would authorize an expansion of the patent monopoly by abandoning settled judicial princi-

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87. *Id.* See notes 41-47 and accompanying text *supra*.

88. 448 U.S. at 214-15, 206 U.S.P.Q. at 404.

89. *Id.*

90. Brief for Petitioner, *supra* note 52, at 23-28.

91. *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 173 U.S.P.Q. 769 (1972) (*Mercoide* opinions cited as support for limiting the invention to what is claimed in the patent); *Blonder-Tongue Labs, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 169 U.S.P.Q. 513 (1971) (*Mercoide* decisions characterized as an attempt to condemn unauthorized efforts to extend the patent monopoly); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 161 U.S.P.Q. 577 (1969) (condemnation of tying schemes repeated); *United States v. Loew's, Inc.*, 371 U.S. 38, 135 U.S.P.Q. 201 (1962) (*Mercoide* cases cited as clear expression of judicial proscription of any conduct involving use of patent to gain a monopoly over unpatented goods).

92. 448 U.S. at 216, 206 U.S.P.Q. at 405.

93. 406 U.S. 518, 173 U.S.P.Q. 769 (1972).

ples.<sup>94</sup> The Court dismissed *Deepsouth* because that case concerned only the scope of direct infringement under section 271(a) and not section 271(d).<sup>95</sup>

Similarly, the Court reasoned that *Aro Manufacturing Co. v. Convertible Replacement Top Co. (Aro I)*<sup>96</sup> and *Aro Manufacturing Co. v. Convertible Replacement Top Co. (Aro II)*,<sup>97</sup> which both involved the distinction between a lawful repair and an infringing reconstruction of a patented convertible top, were not controlling. Although these cases arguably touched upon issues similar to those in *Dawson*,<sup>98</sup> neither opinion directly addressed the problem of the intended effect of section 271(d) upon patent misuse. *Aro I*, the Court concluded, involved the issue of direct infringement, and reliance on the *Mercoïd* decisions merely reflected the Court's endorsement of the principle that the single components of a combination patent are not within the patent monopoly.<sup>99</sup> The decision in *Aro II* was similarly dismissed.<sup>100</sup> The Court did acknowledge, however, that the *Aro II* opinion stated that section 271 was enacted to overrule any blanket invalidation of the contributory infringement doctrine found in the *Mercoïd* opinions.<sup>101</sup> Nevertheless, the *Dawson* Court asserted that its review of the legislative history of section 271 was not out of harmony with the *Aro II* analysis.<sup>102</sup> The fundamental difference between the *Aro* cases and *Dawson*, the Court pointed out, was that *Aro I & II* concerned a replacement-repair market and *Dawson* dealt with a primary use market for a chemical process.<sup>103</sup>

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94. See notes 127-133 and accompanying text *infra*.

95. 448 U.S. at 216, 206 U.S.P.Q. at 405.

96. 365 U.S. 336, 128 U.S.P.Q. 354 (1961). The patent owner invented a convertible top used in the manufacture of automobiles. The alleged infringer sold the fabric used in the convertible top to car owners. For more background on the facts in *Aro I*, see Note, *Patents—Infringement Under 35 U.S.C. § 271(a)—Repair and Reconstruction*, 29 GEO. WASH. L. REV. 952 (1961).

97. 377 U.S. 476, 141 U.S.P.Q. 681 (1964). The *Aro II* case involved essentially the same facts as presented in *Aro I*. The alleged infringer was deemed to have engaged in infringing conduct by selling the special convertible top fabric to unlicensed automobile manufacturers. See generally Conner, *The Second Aro Case: A Realignment of the Supreme Court on the Matter of Contributory Infringement of a Combination Patent*, 34 U. CIN. L. REV. 123 (1965); Note, *Patents—Contributory Infringement—History and Trend: Convertible Top Cases*, 14 DEPAUL L. REV. 473 (1965).

98. 448 U.S. at 216-17, 206 U.S.P.Q. at 405. The *Aro* cases were similar in that the Court was presented with questions involving contributory infringement under § 271.

99. *Id.* at 217, 206 U.S.P.Q. at 405. In *Aro I* Justice Black concluded that the language and history of the Patent Act of 1952 demonstrated that Congress wanted to codify but not expand the judicial doctrine of contributory infringement. In addition, Congress intended to permit patent owners to assert claims of contributory infringement without having such conduct be the basis for denying the patentee relief against direct infringement. Most importantly, Justice Black found that the traditional limitations on the scope of the patent monopoly were not intended to be altered by the enactment of the new patent law. 365 U.S. at 347-50, 128 U.S.P.Q. at 359-61. The *Dawson* Court dismissed Justice Black's statement in *Aro I* as simply inconsistent with its interpretation of § 271. 448 U.S. at 218 n.22, 206 U.S.P.Q. at 405 n.22.

100. *Id.* at 219, 206 U.S.P.Q. at 406.

101. *Id.*

102. *Id.* at 220, 206 U.S.P.Q. at 406-07.

103. The primary use market for the patented invention refers to the initial sale or licensing of the invention to users by the patent owner, whereas the replacement-repair market deals with

## CRITICISM

The fundamental issue before the *Dawson* Court was the statutory interpretation of section 271(d).<sup>104</sup> The validity of the decision depends upon whether the Supreme Court properly construed the statute according to traditional principles of statutory construction.<sup>105</sup> The most persuasive source of legislative intent is the plain language of the statute. If the statute's plain language fails to reveal this intent, then the legislative history, consisting of the committee reports, floor debate, and congressional hearings, must provide the requisite evidence of congressional purpose.<sup>106</sup> When evaluated under these principles, the plain language of section 271(d) does not support the result reached by the *Dawson* Court. Nor do the traditional secondary sources of legislative intent pertaining to section 271(d) sustain the construction of that statute found in the *Dawson* opinion.

The plain language of section 271(d) grants the patent owner the right to engage in three types of activities without being guilty of patent misuse.<sup>107</sup> None of the three subsections contain any language that expressly permits a patentee to condition the right to use the patented device upon the purchase of an unpatented article. The Court conceded<sup>108</sup> that the language of section 271(d) does not expressly cover the tying arrangement employed by the respondent in *Dawson*.<sup>109</sup> Thus, the statute's plain language does not sustain the Court's position that Congress intended to grant a patent owner the right to exploit the patent through tying arrangements, let alone the right to

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the sale of the unpatented components to users of the patented device. Apparently the legal distinction was based upon the premise that preserving competition is a legitimate concern in a replacement market as there are already authorized owners of the invention with the right to repair or replace worn out parts. In a primary use market the fundamental premise is that no buyers are authorized until licensed by the patent owner to use the invention. Therefore competition in a primary use market fosters infringing conduct.

104. 448 U.S. at 179, 206 U.S.P.Q. at 389.

105. See 2A C.D. Sands, *Statutes and Statutory Construction* § 45.05 (4th ed. 1973); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

106. Mr. Justice Reed in *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940), stated:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there can certainly be no "rule of law" which forbids its use, however clear the words may be on superficial examination.

*Id.* at 543-44.

107. 35 U.S.C. § 271(d)(1)-(3) (1976).

108. 448 U.S. at 202, 206 U.S.P.Q. at 399.

109. See note 57 *supra*.



monopolize the market for an unpatented nonstaple component of a patented invention.

The alternative sources of congressional intent derived from legislative materials are generally found in the committee reports and the record of the congressional floor debate that usually accompany the enactment of new legislation. The *Dawson* Court relied heavily upon the legislative history of section 271(d) in determining that Congress intended to exclude the patentee's system of tying unpatented goods to the use of the patent from the charge of misuse.<sup>110</sup> Both the House of Representatives and the Senate reports on the Patent Act of 1952, however, stated that the main purpose of section 271 was "clarification and stabilization."<sup>111</sup> These reports contain no language expressly indicating that Congress intended to give patent owners the right to use tying schemes and escape the charge of patent misuse. The majority in *Dawson* noted that the Senate and House reports on the 1952 Act gave cursory attention to the specific features of the new law,<sup>112</sup> but in the Court's estimation the congressional reports revealed an effort to enact substantive changes in the patent laws.<sup>113</sup> This conclusion, even if accurate, falls far short of the blanket authorization of tying arrangements involving nonstaple goods that the *Dawson* Court endorsed. The reports do not contain the slightest indication that Congress desired to extend the patent monopoly beyond previously recognized limits to cover unpatented nonstaple articles.<sup>114</sup> In fact, the record of the Senate floor debate on the 1952 Act casts doubt upon the Court's position that the legislation was meant to effect substantial changes in the patent laws.<sup>115</sup> Even assuming that some substantive changes were incorporated into the massive congressional effort to codify all the patent laws in a single title, the congressional reports and floor debate provide no insight as to the particular changes that may have been intended.

The remaining source of legislative history cited frequently in the *Dawson* opinion was testimony given during the committee hearings<sup>116</sup> that led to the enactment of the Patent Act of 1952. To buttress its interpretation of section 271(d), the Court relied mainly upon the statements of witnesses before the committees,<sup>117</sup> frequently citing the testimony of Giles Rich.<sup>118</sup> In the 1949

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110. 448 U.S. at 202-03, 206 U.S.P.Q. at 399.

111. H.R. REP. NO. 1923, 82d Cong., 2d Sess. 9 (1952); S. REP. NO. 1979, 82d Cong., 2d Sess. 8 (1952).

112. 448 U.S. at 203, 206 U.S.P.Q. at 399.

113. *Id.* at 204, 206 U.S.P.Q. at 399.

114. See note 33 *supra*.

115. Prior to the Senate vote on the Patent Act of 1952, Senator McCarran, who was chairman of the Senate committee that had conducted the hearings on the bill, was asked the following question by Senator Saltonstall: "Does the bill change the law in any way or only codify the present patent laws?" Senator McCarran replied, "It codifies the *present* patent laws." 98 CONG. REC. 9323 (1952) (emphasis added).

116. 1948 *Hearings*, 1949 *Hearings* and 1951 *Hearings*, *supra* note 76.

117. The Court's reliance on the testimony of witnesses before congressional committees as a guide to the construction of a statute in contravention of the intent apparently expressed in the committee reports and congressional debate is a questionable application of the principles of

hearings, Mr. Rich and other proponents of the new law argued that to revive contributory infringement, deemed essential in the aftermath of the *Mercoïd* decisions, it would be necessary to restrict the scope of patent misuse. This restriction was to be accomplished by exempting certain *acts* from the purview of the doctrine.<sup>119</sup> Based on this testimony, the Court reasoned that section 271(d) would allow the patentee to control those goods like the switches in the *Mercoïd* cases.<sup>120</sup> Other testimony, largely ignored by the Court, suggests that some proponents characterized section 271(d) as a remedial measure aimed at protecting those patent owners, like the one in *Mercoïd*, who were willing to license others to supply the unpatented nonstaple components of the invention.<sup>121</sup>

In the 1951 hearings, Mr. Rich again pressed for the passage of section 271(d) to nullify the patent misuse application found in *Mercoïd*.<sup>122</sup> His testimony indicates, however, that the intended effect of section 271 did not include expansion of the patentee's monopoly powers to encompass unpatented nonstaple components. Although the Court asserted that testimony given by Department of Justice officials indicated they believed that section 271(d) would permit the use of tying arrangements,<sup>123</sup> this interpretation was refuted by Representative Crumpacker.<sup>124</sup> When asked by Crumpacker if

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statutory construction. See *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) (statements made to congressional committee found without weight in the interpretation of a statute). See also *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 223-24, 206 U.S.P.Q. 385, 408 (1980) (White, J., dissenting).

118. See note 81 *supra*.

119. 448 U.S. at 208, 206 U.S.P.Q. at 401.

120. *Id.*

121. Stephen Cerstvik testified before the congressional committee on behalf of the Aircraft Industries Association. He stated:

Manufacturers of unpatented nonstaple components could avoid liability as contributory infringers, prior to the *Mercoïd* cases, by obtaining a license from the patent owner and paying him royalties on the sale of the unpatented components for use in the patented combination. At present, and as a result of the decisions of the *Mercoïd* cases, this cannot be done without the danger of the patent owner subjecting himself to the possible charge that he is misusing his patent to control the sale of unpatented products by the collection of royalties on the sale of such unpatented products.

1949 *Hearings*, *supra* note 76, at 26. Giles Rich, during the same hearings, testified that: The courts would say . . . if they logically follow the *Mercoïd* case, that the granting of this license [to a competing producer of nonstaple goods] is a misuse because you are attempting to collect royalties from somebody under your patent for doing something which, per se, is not an infringement of your patent. It is not covered by your claim.

*Id.* at 16.

122. 448 U.S. at 210-11, 206 U.S.P.Q. at 402.

123. *Id.*, 206 U.S.P.Q. at 403.

124. Mr. Crumpacker responded to the interpretation of § 271(d) advanced by the Department of Justice by stating:

It seems to me that the language is clear, and it says that he shall not be denied relief or be deemed guilty of misuse because of having done any of these three things. It doesn't say the reverse of that, that because of having done these things he shall be deemed not guilty of misuse.

1951 *Hearings*, *supra* note 76, at 167.

such monopolistic practices would still be susceptible to the patent misuse doctrine, Mr. Rich responded that section 271(d) would not prevent such acts from being characterized as patent misuse.<sup>125</sup>

A careful review of the legislative history discloses no clear congressional intent to tolerate a patentee's attempt to extend the legal monopoly to unpatented nonstaple goods. It may be argued, however, that section 271(d) was intended to implicitly authorize the use of tying arrangements with patent licensing. Still, it is obvious that neither the statutory language nor the legislative history of the Patent Act presents a clear and certain signal that Congress intended section 271(d) to expand the monopoly power of a patent owner to cover unpatented nonstaple goods.

Yet, absent a clear statement of congressional intent, the *Dawson* Court should not have construed a statutory provision as expanding monopoly rights in conflict with prior case law.<sup>126</sup> Indeed, prior cases required a clear expression of congressional intent where a patent owner argued that section 271 was intended to extend the reach of the patent privilege while making the area of public use narrower than previously established by the courts. Such an argument was advanced in *Deepsouth Packing Co. v. Laitram Corp.*<sup>127</sup> In that case, the Court held that section 271 was to be strictly construed "in light of this Nation's historical antipathy to monopoly and of repeated congressional efforts to preserve and foster competition."<sup>128</sup> An argument based upon ambiguous statutory language was deemed insufficient by the *Deepsouth* Court to support the expansion of patent rights that would require overruling or modifying prior case law.<sup>129</sup> The Court concluded in *Deepsouth* that only a "clear and certain signal from Congress" would be sufficient to compel the Court to sanction any widening of patent monopoly rights beyond previously delineated bounds.<sup>130</sup>

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125. The exchange between Mr. Crumpacker and Mr. Rich was as follows:

MR. CRUMPACKER: As you interpret this paragraph (d) as it now reads, would it in any way prevent a court from holding the monopolistic practices referred to as being a misuse of a patent? That is, where a patentee has actually been engaged in trying to gain a limited monopoly of unpatented articles through the use of a patent.

MR. RICH: The answer is that (d) would not prevent their being held, the acts being held to be misuse.

1951 *Hearings*, *supra* note 76, at 173-74. The *Dawson* Court rejected the petitioner's interpretation of this exchange. 448 U.S. at 213-14 n.20, 206 U.S.P.Q. at 404 n.20.

126. See notes 127-133 and accompanying text *infra*.

127. 406 U.S. 518, 173 U.S.P.Q. 769 (1972).

128. *Id.* at 530, 173 U.S.P.Q. at 773-74.

129. The *Deepsouth* Court enunciated the principles of statutory construction to be applied in cases where a patent owner argues that legislation was intended to extend the patent monopoly: "It follows that we should not expand patent rights by overruling or modifying our prior cases construing the patent statutes, unless the argument for expansion of privilege is based on more than mere inference from ambiguous statutory language." *Id.* at 531, 173 U.S.P.Q. at 774.

130. "We would require a clear and certain signal from Congress before approving the position of a litigant who, as respondent here, argues that the beachhead of privilege is wider, and the area of public use narrower, than courts had previously thought." *Id.*

The *Dawson* Court dismissed any consideration of the *Deepsouth* decision because that case required the Court to interpret section 271(a), not section 271(d).<sup>131</sup> Nevertheless, the principles of statutory construction contained in *Deepsouth* are no less compelling when a patent owner relies upon section 271(d) as the basis for permitting an expansion of the patent privilege.<sup>132</sup> Neither the language of section 271(d) nor its legislative history provides "a clear and certain signal" that Congress intended to expand the patent monopoly in either of the two ways asserted by the respondent in *Dawson*.<sup>133</sup> Absent a clear signal from Congress authorizing a change in the status of the patent monopoly, principles enunciated in *Deepsouth* should have compelled the Court to reject both of the respondent's claims in *Dawson* and apply prior case law to find the patent owner had misused the patent.

#### A SUGGESTED APPROACH

Important policy objectives cannot be ignored when a question of statutory construction bears upon the interface of the patent and antitrust laws.<sup>134</sup> Contributory infringement is an extension of the policy objectives of the patent law.<sup>135</sup> Correspondingly, patent misuse, with respect to tying arrangements, reflects the concerns of the antitrust laws.<sup>136</sup> Congress has not indicated with any clarity or certainty whether a patent owner can use a tying arrangement to create a monopoly in the market supplying an unpatented nonstaple article.<sup>137</sup> Absent a statutory solution the Court should have considered the implications of its ruling in *Dawson* for both antitrust and patent policy.<sup>138</sup>

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131. 448 U.S. at 216, 206 U.S.P.Q. at 405.

132. The statutory principles of *Deepsouth* have been relied upon by the Supreme Court in cases requiring the interpretation of sections of the Patent Act other than 271. In *Parker v. Flook*, 437 U.S. 584, 198 U.S.P.Q. 193 (1978), the Court found that a mathematical formula forming the only novel feature of a process for updating alarm limits in the catalytic conversion of hydrocarbons was unpatentable. In refusing to recognize that the subject matter was patentable under 35 U.S.C. § 101 (1976), the Court quoted the *Deepsouth* statutory principles as indicating that caution should be used when courts are asked to extend patent rights. *Id.* at 596, 198 U.S.P.Q. at 200.

133. See notes 106-111 and accompanying text *supra*. See also notes 121-125 and accompanying text *supra*.

134. See, e.g., Bowes, *The Patent—Antitrust Law Interface: How Should It Be Defined?*, 18 IDEA 25 (1976); Kidwell, *Patent—Right Interchange and Antitrust Policy: Defining the Interface*, 43 U. COLO. L. REV. 369 (1972); Maffei, *The Patent Misuse Doctrine: A Balance of Patent Rights and the Public Interest*, 52 J. PAT. OFF. SOC'Y 178 (1970); Stedman, *The Patent—Antitrust Interface*, 58 J. PAT. OFF. SOC'Y 316 (1976).

135. See notes 28-29 and accompanying text *supra*.

136. See notes 33-35 and accompanying text *supra*.

137. See notes 106-111 and accompanying text *supra*. See also notes 121-125 and accompanying text *supra*.

138. When the objective of statutory interpretation is to determine whether a patent owner's conduct is a legitimate exercise of his or her legal monopoly, it is crucial that the courts not adopt a rigid per se rule to resolve the question. Well-settled principles of antitrust and patent law may have different effects when applied to the facts of one case as opposed to another. A particular

Had the Court balanced the policy objectives of the antitrust and patent laws, it might have opted for a more cautious and reasonable resolution to the *Dawson* conflict. A tying scheme can enhance the economic reward received by a patent owner making the legal monopoly more profitable to the inventor. Increasing the remunerative aspects of the patent monopoly promotes the policy objectives of the patent law. Conversely, requiring the patent owner to license competitors that supply the tied product fosters competition favored by the antitrust laws. Permitting the use of a tying arrangement only when competition in the unpatented nonstaple component is maintained represents a balanced approach toward resolving the policy conflict present in *Dawson*.

This balanced, moderate solution to the questions raised in *Dawson* could have been justified by a slightly different interpretation of the language and legislative history of section 271(d). To resolve the central problem in *Dawson*—the permissibility of a tying arrangement—it was necessary to determine the judicial attitude toward these arrangements prior to the passage of section 271 and what effect, if any, this judicial treatment had on the drafting of the statute.<sup>139</sup>

Before the statute's enactment, the judicial doctrine of patent misuse, created to reflect the policy objectives of the antitrust laws, was relied upon by the courts to prohibit the use of any tying arrangements by a patent owner.<sup>140</sup> Patent misuse preserves competition by ensuring that a patentee shall not extend the legal monopoly beyond the limits of the patent grant. A tying arrangement under certain circumstances is a per se violation of the antitrust laws.<sup>141</sup> In analyzing tying arrangements under the doctrine of

course of conduct may have quite distinct results depending upon the circumstances. Consequently, the public interest is best served by the application of a rule of reason. A judicial inquiry into the total factual context surrounding a particular course of conduct will lead to a determination of the issue that protects the patent owner's rights as well as the public interest. *See generally* Maffei, *The Patent Misuse Doctrine: A Balance of Patent Rights and the Public Interest*, 52 J. PAT. OFF. SOC'Y 178 (1970); Stedman, *The Patent—Antitrust Interface*, 58 J. PAT. OFF. SOC'Y 316 (1976).

139. *See* note 48 and accompanying text *supra*.

140. *See* *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 52 U.S.P.Q. 30 (1942) (tying use of patented dispensing machine to purchase of salt tablets held to be misuse); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 36 U.S.P.Q. 35 (1938) (tying purchase of unpatented bituminous emulsion to use of patented process for curing cement held misuse); *Carbice Corp. v. American Patents Dev. Corp.*, 283 U.S. 27, 8 U.S.P.Q. 211 (1931) (tying use of a patented refrigeration package to purchase of dry ice was patent misuse); *Motion Pictures Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917) (requiring the purchase of unpatented film to use patented projection equipment deemed misuse).

141. The core of the present antitrust policy is represented by three main statutes: (1) Sherman Act of 1890, 15 U.S.C. §§ 1-7 (1976); (2) Clayton Act, 15 U.S.C. §§ 12-27 (1976); and (3) Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976). Tying arrangements may violate antitrust laws under § 3 of the Clayton Act and § 1 of the Sherman Act. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Sherman Act § 1, 15 U.S.C. § 1 (1976). Section 3 of the Clayton Act, 15 U.S.C. § 14 (1976) states:

patent misuse prior to the enactment of the Patent Act of 1952, the courts applied a rigid rule similar to the application of antitrust laws.<sup>142</sup> The enactment of section 271 was largely a response to the problems created by the harsh applications of the patent misuse doctrine.<sup>143</sup> Even so, the language of section 271(d) is that of exceptions to the misuse doctrine and not a wholesale grant of statutory immunity to a patent owner who creates a monopoly in the market supplying the unpatented nonstaple component. Congress did not intend section 271(d) to endorse or reject tying arrangements per se. Instead, it appears that Congress adopted a more balanced approach to the conflicting policy considerations that are ever present when patent law interacts with antitrust law. Congress was apparently trying to modify the Court's view that some conduct was patent misuse per se irrespective of the actual effect it might have had on competition. If the *Dawson* Court had accepted this interpretation of section 271(d), then the logical result would have been to permit the use of tying arrangements only under circumstances where competition in the market supplying the nonstaple component would not be eliminated.<sup>144</sup> The Court held, however, that the

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It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

*Id.*

The general rules outlined by the Supreme Court deem a tying arrangement to violate § 3 of the Clayton Act when the seller enjoys a monopoly in the market for the tying product or if a substantial volume of commerce in the tied product is restrained. When both conditions result from using a tying scheme then such arrangements are violations of § 1 of the Sherman Act. In addition, the courts will hold a tying arrangement unreasonable per se whenever the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and an appreciable amount of interstate commerce is affected. The owner of a patent on a tying device will be deemed in all cases to possess sufficient economic power to restrain free competition in the tied product. See NORDHAUS, PATENT—ANTITRUST LAW § 84c, at 1-2 (1977). See also Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283 (1980).

142. The most rigid application of the patent misuse doctrine appears in the *Mercoïd* decisions. The Supreme Court stated that extending the patent monopoly to *any* unpatented articles via a tying arrangement constituted patent misuse per se. Proponents of § 271 testifying before congressional committees indicated that the *Mercoïd* rule was too rigid and that more flexibility should be interjected into the patent misuse doctrine in situations involving nonstaple goods and a patent owner willing to license competitors. See notes 46-47, 121 and accompanying text *supra*.

143. See note 48 *supra*.

144. The interpretation of § 271(d) offered by the suggested approach would permit Rohm & Haas to condition the right to use the patented application process upon the purchase of propanil *only if* licensees could obtain the unpatented propanil from a source other than Rohm & Haas. Competition in the market supplying propanil could be preserved if Rohm & Haas granted

respondent was free to use a tying arrangement to monopolize the sale of propanil. The Court ignored the policy objectives favoring competition and instead applied the rigid *Mercoird* rule in reverse by holding that regardless of the effect on the competition, tying arrangements are not a misuse of the patent when they involve unpatented nonstaple goods.

#### IMPACT

The impact of the *Dawson* decision was quickly recognized by the chemical industry as sanctioning the monopolization of unpatented nonstaple chemical components of a patented process.<sup>145</sup> It is probable that other owners of patents incorporating nonstaple components will seek to establish the same monopoly using their patents. Undoubtedly, as patent owners take advantage of the new monopoly power created by *Dawson*, effects will be felt among suppliers of unpatented nonstaple components, users of the patented inventions that require such components, and quite possibly courts that process contributory infringement litigation.

A patent owner has to follow only the simple implied licensing scheme used by the respondent in *Dawson*<sup>146</sup> to eliminate all domestic sources of supply for the nonstaple component of the patented invention. The result is that those wishing legally to practice the patented invention are required to purchase an essential element from only one source, the owner of the patent. Consequently, the benefits of market competition are destroyed. Buyers of the nonstaple good will no longer be able to select a supplier that provides the best product at the lowest price on terms and conditions a buyer's business might require. Unrestricted supply of goods in a free market encourages price flexibility by ensuring that one supplier will be able to provide goods when buyers believe a competitor's price is too high. When the patent owner is the exclusive source for nonstaple components that price flexibility is undermined. The patent owner is able to set his or her price at a level that could not be maintained normally in a competitive market.<sup>147</sup> Under these

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royalty-bearing licenses to other propanil producers. Rohm & Haas could also license rice farmers directly to practice the patented application method with a royalty to be paid based upon the volume of propanil used by the farmer. In addition, the same royalty arrangement could be extended to persons who are sprayers or applicators of propanil. The patent law does grant the patent owner the exclusive right to his invention and Rohm & Haas would be within that right if it practiced the patented method itself by spraying rice fields and not licensing anyone. See Brief for Petitioner, *supra* note 52, at 30.

145. Two weeks after the Supreme Court handed down the *Dawson* decision, a trade journal of the chemical industry reported that a process patent "can be used to monopolize the sale of a chemical in the U.S., if that compound is a nonstaple item." See CHEMICAL ENGINEERING, July 14, 1980, at 68.

146. See note 57 *supra*.

147. In a market where there is only one supplier of the product, the output is controlled by that supplier. By decreasing the supply of available product the monopolist can raise the price for the article. If there were more suppliers, the output could not be manipulated to raise the price of the product. See generally R. POSNER, ANTITRUST LAW 8-9 (1976).

circumstances, there is no longer any incentive to refine production facilities or to invent new methods of producing the nonstaple good more efficiently.<sup>148</sup> Indeed, the supplier of the nonstaple goods will be able to dictate the terms and conditions of a sale to the buyer. The inflated costs usually created by a monopoly will be passed along to consumers of the products manufactured by the industry employing the patented invention. For those small businesses that cannot absorb the inflated costs created by the monopoly the effect will prevent them from competing with larger users of the patented invention. This ripple effect of a monopoly continues to affect competition in related industries and the economic burdens will be borne ultimately by the consuming public.

It is equally possible that the courts themselves will feel the impact of the *Dawson* decision directly through an increase in contributory infringement litigation. The economic advantages of being able to derive profits from a patented process or method simply by supplying the essential nonstaple components of the invention in a market free from competition are enormous.<sup>149</sup> Of course, before being able to establish that a patent owner is entitled to use the power created by the *Dawson* opinion, the patentee must prove that the unpatented component is essential to the invention and is a nonstaple without a substantial noninfringing use.<sup>150</sup> If the question of a component's staple/nonstaple status is arguable, a patent owner may be encouraged to sue all competing suppliers as contributory infringers in an effort to establish the monopoly. Consequently, there could be a tremendous surge in new contributory infringement litigation. The prospect of protracted and expensive court battles could force competitors to withdraw from the market creating de facto monopolies over allegedly nonstaple goods. Increased litigation could place new demands on the already burdened court system and push up costs for the parties involved. Again, the taxpayer and the consuming public will bear the economic burden.

#### CONCLUSION

The Court's expansion of the patent monopoly privilege in the *Dawson* decision could have been avoided by balancing the policy objectives embodied in the contributory infringement and patent misuse doctrines.<sup>151</sup> A balanced approach to the decision would have protected the patentee's privilege to derive economic benefit from the patent by permitting the use of

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148. "Monopolists . . . can also maximize profits by minimizing their costs at each output level, but, without the goad of intense price competition, they may fail to do so. They may tolerate obsolescent equipment, swollen bureaucracy and outworn production techniques." P. AREEDA, *ANTITRUST ANALYSIS* 20 (1974).

149. See notes 147-148 and accompanying text *supra*.

150. The language of § 271(d) is ancillary to § 271(c) which defines contributory infringement in terms of articles which are not staple items suitable for substantial noninfringing use. See note 9 *supra*.

151. Ms. Mary Jones, former Commissioner of the Federal Trade Commission, speaking to the impact of the patent and antitrust laws on consumers stated:



tying arrangements. Yet competition among suppliers of the unpatented nonstaple components could have been preserved.<sup>152</sup> The power to monopolize the sale of unpatented nonstaple components, recognized by the *Dawson* opinion, is a powerful economic incentive to exploit a patented invention by using tying arrangements. The result could be an unnecessary increase in contributory infringement suits and increased costs to consumers.

*Stephen Francis Sherry*

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If we still believe in the goals of our antitrust laws to prevent the exercise of private monopolies and to promote competition as a viable means of achieving our basic social and economic objectives, then we cannot virtually eliminate their application in the patent field without seriously compromising and rendering essentially meaningless our larger goals of regulating the exercise of market power through antitrust laws and creating the type of competitive environment so essential for the welfare of our citizens and the health and prosperity of the nation.

M. JONES, THE IMPACT OF THE PATENT AND ANTITRUST LAWS ON CONSUMERS IN ANTITRUST PRIMER: PATENTS, FRANCHISING, TREBLE DAMAGE SUITS 57 (1970).

152. See note 144 and accompanying text *supra*.